Supreme Court, U.S
FILED
AUG 5 1993
OFFICE OF THE CLERK

No. 92-1750

In The

Supreme Court of the United States

October Term, 1993

JOHN C. FOGERTY,

Petitioner,

vs.

FANTASY, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF ON THE MERITS OF PETITIONER

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I.

QUESTION PRESENTED

Whether the prevailing Ninth Circuit standard for awarding attorney's fees in copyright actions, which makes it more difficult for prevailing defendants to obtain an award of attorney's fees than for prevailing plaintiffs and which precludes awards of attorney's fees to prevailing defendants absent a finding that the action was frivolous or brought in bad faith, is the proper standard to be applied under the Copyright Act, 17 U.S.C. § 505.

II.

PARTIES TO THE PROCEEDINGS

In addition to the Petitioner and Respondent named in the caption, above, the following entities were defendants and appellants in the proceedings below: Warner Bros. Records Inc., WEA International Inc., WEA Manufacturing Inc., Warner-Elektra-Atlantic Corporation, and Warner Communications Inc. (sometimes referred to collectively herein as the "Warner Defendants"). The only issue raised in this petition relates to the proper standard for an award of attorney's fees to prevailing defendants, and due to a contractual agreement between them, Fogerty has indemnified the Warner Defendants for and has in fact paid the attorney's fees incurred by such defendants.

Pursuant to Rule 29.1 of the Supreme Court Rules, Petitioner makes the following disclosure: Warner-Elektra-Atlantic Corporation (referred to as "WEA Corporation" in the proceedings below) is a subsidiary of Warner Bros. Records Inc. Warner Bros. Records Inc., WEA International Inc., and Warner Manufacturing Inc. are subsidiaries of Warner Communications Inc. Warner Communications Inc. is a direct subsidiary of TWE Holdings Inc. and an indirect subsidiary of Time Warner Inc. While some of the Warner entities which are parties to this action have subsidiaries, such subsidiaries are wholly-owned. None of the Warner entities which are parties to this action are publicly traded corporations, and, of the parent and subsidiary corporations listed above, only Time Warner Inc. is a publicly-traded corporation.

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BRIEF ON THE MERITS OF PETITIONER

V.

JUDGMENTS BELOW

The judgment and opinion in the matter of *Fogerty, et al. v. Fantasy, Inc.*, Docket Nos. 88-15815, 88-15816, 89-15118, and 89-15120, was entered by the United States Court of Appeals for the Ninth Circuit on February 2, 1993, and is reported at 984 F.2d 1524 (9th Cir. 1993). A copy of the judgment and opinion is attached to the Petition for Writ of Certiorari filed by Petitioner at App.

A-1.[1] The opinion and order of the United States District Court in Case No. C85-4929-SC dated January 6, 1989, which was affirmed by the above, is unreported and is attached to the Petition at App. A-23.[2]

VI.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The order of the Ninth Circuit for which review is sought was entered on February 2, 1993. (App. A-1.) No petition for rehearing was sought in the Ninth Circuit, and no extension of time within which to file a petition for a writ of certiorari was sought.

The District Court had subject matter jurisdiction over respondent Fantasy's claim for copyright infringement pursuant to 17 U.S.C. § 501 *et seq.* and over pendant claims pursuant to 28 U.S.C. §§ 1331, 1338(a). The District Court had subject matter jurisdiction over Fogerty's counterclaims pursuant to 17 U.S.C. § 501 *et seq.* and pendant jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338(b).

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[1] The Appendix attached to the Petition shall be referred to herein as "App." and the Joint Appendix shall be referred to herein as "JA".

[2] The Court of Appeal in *Fogerty v. Fantasy, Inc.*, 984 F.2d 1524 (9th Cir. 1993) also affirmed two other orders of the District Court, dated May 2, 1986 and June 9, 1987, which are not the subject of this petition.

VII.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

17 U.S.C. § 505. Remedies for Infringement: Costs and Attorney's Fees.

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

United States Constitution, Article 1, Section 8, Clause 8.

[Congress shall have the power] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

VIII.

STATEMENT OF THE CASE

The Court has granted the Petition of Petitioner John Fogerty ("Fogerty") for review by writ of certiorari of an order of the Ninth Circuit Court of Appeals entered on February 2, 1993 (App. A-1), affirming the Order of the court below denying an award of attorney's fees to Fogerty and

the Warner Defendants[3] after they prevailed at trial on respondent Fantasy Inc.'s ("Fantasy") copyright infringement claims. (App. A-23 at A-30 through A-32.)

Fogerty's relationship with Saul Zaentz[4] and Fantasy[5] and the music publishing contracts at issue in this copyright infringement action goes back to 1968, when Fogerty was the lead singer and songwriter of a musical group which came to be known as "Creedence Clearwater Revival" ("CCR"). (CT No. 27, pp. 15-16.)[6] Within a very short period of time, CCR became hugely successful, making several record albums which went "platinum," recording singles which reached the Billboard Top Ten, and selling tens of millions of records. (RT 670-671; 688-689; 693-694; 696-697; 703; 711.) CCR, with Fogerty as its creative leader, developed a distinctive style of

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[3] Pursuant to an agreement between Fogerty and the Warner Defendants, Fogerty indemnified and reimbursed the Warner Defendants for their attorneys' fees and costs incurred in defending this action, paying a total of over $1 million for both his and the Warner Defendants' defenses. *See* footnote 10, *infra*.

[4] Saul Zaentz is the person who Fogerty has known over the years as the principal owner and controlling officer of Fantasy.

[5] As used herein, "Fantasy" will refer to the respondent Fantasy, Inc. and its predecessors in interest, Fantasy/Galaxy Records, Argosy Venture, and the various business names used by them and by Zaentz for the record and music publishing businesses that exploited the songs written by John Fogerty and performed by Creedence Clearwater Revival, including "Jondora Music," "Cireco," "Galaxy," and "Debut of California."

[6] The Clerk's Transcript from the record below is referred to herein as "CT." The Reporters' Transcript is referred to herein as "RT."

music (dubbed "swamp rock" by the media) which was and still is widely popular. (RT 412, 680.)

Due in part to numerous disputes with Zaentz and Fantasy,[7] CCR disbanded in 1972. (RT 712.) In 1974, Fantasy's predecessor allowed Fogerty to buy his partial freedom from his recording and music publishing agreements, and Fogerty signed with Elektra/Asylum Records, then a division of Warner Communications Inc. (CT No. 27, p. 19; RT 403-411; 429.) In 1984, Fogerty and the Warner Defendants released an album entitled "Centerfield," Fogerty's first album in ten years. (RT 725, 740-41; CT No. 228, p. 2; 168, pp. 8-9.) This album was critically acclaimed and a hit with the public, selling over two million copies, and was for a time the number one selling album in the United States. (RT 741.)

The "Centerfield" album included, among others, a song entitled "Old Man Down The Road" ("Old Man"). (Trial Exh. 126.) Within months after the release of "Centerfield," two lawsuits were simultaneously filed which challenged Fogerty's right to create and market the songs on "Centerfield". On July 26, 1985, the same day that respondent Fantasy filed the instant copyright infringement action, Zaentz filed an action against Fogerty in state court, claiming that Fogerty had defamed him in

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[7] There has been much antagonism between Messrs. Fogerty and Zaentz over the years. According to Fogerty, broken promises made by Zaentz were material factors in the breakdown of the relationship between CCR and Fantasy, and, eventually, in the breaking up of CCR itself. Such broken promises were certainly factors in Fogerty's desire to record for another label in 1974. (*See* Exhibits to CT 1.)

interviews he had allegedly given and in the lyrics to the songs on "Centerfield" entitled "Zanz Kant Danz" and "Mr. Greed."[8] (CT No. 1; RT 910-911.)

Fantasy's federal copyright infringement claim in this action was based upon its assertion that "Old Man," the copyright to which is owned by Fogerty, was an unauthorized copy of the song "Run Through The Jungle" ("Jungle"), which Fogerty had written in or about 1970 and the copyright to which is claimed by Fantasy. The jury trial of Fantasy's federal copyright infringement claim[9] commenced on October 24, 1988. (CT No. 378.) On

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[8] This was not the first litigation filed between Fantasy and Fogerty. In 1978, Fogerty and his wife, Martha, had filed a complaint in state court in California which included Fantasy's predecessor (Argosy Venture) and Saul Zaentz as defendants. (CT No. 27, Exh. A.) After Fantasy's predecessor and Zaentz were dismissed from that action on statute of limitations grounds, Zaentz brought a lawsuit against Fogerty for malicious prosecution. (CT No. 42, Exh. 11, p. 71 RT 908-910.) Zaentz' action against Fogerty was later dismissed on summary judgment. (RT 910.) During the course of the copyright trial, Zaentz testified that the copyright and defamation actions brought against Fogerty were "an answer to a vendetta." (RT 908.)

[9] Fantasy's original Complaint, filed on July 26, 1985, alleged claims of copyright infringement, breach of contract, breach of the covenant of good faith and fair dealing, conspiracy, violation of 15 U.S.C. § 11250(a), unfair competition, declaratory relief and conversion. (CT No. 1.) The pendant, state law and Lanham Act claims asserted by Fantasy were voluntarily dismissed before trial after Fogerty filed a motion for judgment on the pleadings with respect to such claims. (CT Nos. 93, 279.) Fogerty counterclaimed against Fantasy, alleging claims for rescission of his music publishing agreements with Fantasy's claimed predecessors and for restitution of his songs, copyright infringement, damages, and an accounting. (CT No. 7.) Certain

November 7, 1988, after only a little over two hours of deliberations, the jury returned a verdict for the defendants and against Fantasy, and judgment was entered for Fogerty and the Warner Defendants on that date. (JA 2; CT No. 391.)

After the successful conclusion of the jury trial and the entry of judgment on the jury verdict in favor of all defendants and against plaintiff, Fogerty and the Warner Defendants filed a motion for an award of their actual costs and for an award of reasonable attorney's fees pursuant to 17 U.S.C. § 505. (JA 3, 5, 61.) In support of the motion, the moving parties submitted evidence documenting their actual costs in the sums of $129,882.80 and $28,042.32 and their actual legal fees in the sums of $735,335.00 and $197,462.00.[10] (CT Nos. 403, 404.) The District Court awarded costs only in the sums of $18,012.60 and $2,063.25 and denied in full the request for

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parts of Fogerty's counterclaims were stricken by order of the District Court entered on May 2, 1986, and, on June 9, 1987, the District Court granted summary judgment to Fantasy on Fogerty's first and second counterclaims for rescission and copyright infringement. (CT Nos. 52, 228.)

[10] Pursuant to an agreement between them, Fogerty indemnified and actually paid the legal fees and costs incurred by the Warner Defendants. Hence, Fogerty incurred a total of $1,090,772.12 in legal fees and costs in this action. The magnitude of the fees incurred in this action is the result, in part, of the extensive discovery conducted by Fantasy (who took Fogerty's deposition for five days without even asking about the songs in question) and motion practice regarding the extent to which Fantasy could include foreign sales proceeds of the Warner Defendants in its damage claim. In addition, the case was pretried several times, and the trial itself lasted two weeks.

an award of reasonable attorney's fees. (App. A-23 at A-30 to 32.)

In denying an award of attorney's fees to the defendants, the District Court stated that it was doing so based upon the Ninth Circuit standard for awards of attorney's fees to prevailing defendants under 17 U.S.C. § 505. That standard requires a finding of either frivolousness or bad faith in order for such an award to be made to a defendant who defeats a claim of copyright infringement. (App. A-23 at A-30.) In applying this standard, the District Court held:

> "The Court finds that Fantasy's infringement suit was not brought frivolously nor in bad faith. Although the facts of this case did not present the textbook scenario of copyright infringement, the Court has held that Fogerty could indeed be held liable for copyright infringement even where he also wrote the song allegedly infringed. *Fantasy, Inc. v. Fogerty*, 654 F.Supp. 1129, 1132 (N.D.Cal. 1987). Fantasy's suit was not frivolous merely because it presented a case of first impression. Nor does Fantasy's "knowledge of Fogerty's creativity" mean that this suit was brought in bad faith, where a finding of subconscious copying would have supported Fantasy's infringement claim. And although the Court did not allow Fantasy to maintain a "breach of warranty" claim, Fantasy's attempt to argue such a theory is no more in bad faith than was Fogerty's pretrial assertion that the "fair use" defense of the Copyright Act was applicable to him.

> "Because the Court finds that Fantasy's suit alleging that "Old Man" infringed upon "Jungle" was not filed frivolously nor in bad faith, the Court finds that whatever animosity exists between Fogerty and Zaentz does not warrant an award of attorneys' fees. Fogerty's motion for attorneys' fees is HEREBY DENIED."

(App. A-23 at A-31 through A-32.)

On appeal to the Ninth Circuit, Fogerty and the Warner Defendants requested, *inter alia*, that the Court of Appeals adopt an evenhanded rule for awards of attorney's fees pursuant to 17 U.S.C. § 505, or carve out an exception to the dual standard in cases where self-copying is alleged against a defendant. Defendants requested an *en banc* hearing with respect to this issue, which was denied. In affirming the District Court's denial of an award of attorney's fees to Defendants, the Court of Appeal held:

> "With regard to Fogerty's argument that the existing Ninth Circuit standard should be abandoned in favor of the approach of the Third and Eleventh Circuits, this panel is bound by the existing circuit rule, which conforms with the approach of the Second and Seventh Circuits. *See, Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1022 (7th Cir.), *cert. denied*, 112 S.Ct. 181 (1991); *Roth v. Pritikin*, 787 F.2d 54, 57 (2nd Cir. 1986). We decline to create an exception or to call for an *en banc* hearing to revisit the rule at this time."

(App. A-1 at A-22.) It is this ruling which is the basis for Fogerty's petition to this Court.

IX.

SUMMARY OF THE ARGUMENT

The dual standard for awarding attorney's fees under Section 505 of the Copyright Act adopted by the Ninth Circuit provides that prevailing plaintiffs should be awarded their fees as a matter of course but that prevailing defendants must demonstrate that the action was frivolous or brought in bad faith in order to recover attorney's fees. This dual standard is not consistent with the constitutional mandate underlying the Copyright Act found in Article 1, Section 8, Clause 8 of the United States Constitution.

There is no rational policy justification for distinguishing between prevailing plaintiffs and defendants in copyright actions. An action in which a defendant prevails may promote the progress of science and the useful arts as effectively as an action in which a plaintiff prevails. Here, in successfully defending against Fantasy's copyright infringement action, Fogerty validated his copyright to the song "Old Man" as an originally-created work. A rule which makes it more difficult for defendants such as Fogerty, who are the authors of copyrighted works, to recover their attorney's fees against a losing plaintiff would discourage the vigorous defense of actions where the originality of a new copyright is challenged, since defendants who incur substantial attorney's fees to defend their copyright will not be made whole while plaintiffs are in most cases assured recovery of their reasonable attorney's fees if they succeed.

Section 505 should be interpreted to be consistent with the underlying policies of the Copyright Act to

further the goal of promoting the creation of new works by authors. An evenhanded rule, which does not discriminate between prevailing plaintiffs and defendants, furthers these policies and goals by encouraging not only meritorious copyright infringement claims, but also meritorious copyright defenses. A copyright defendant who demonstrates that he has created a new, original work or who establishes that the plaintiff's alleged copyright protected work is in fact in the public domain furthers the goals of the Copyright Act as much as, if not more than, a copyright plaintiff who merely establishes that a defendant copied or made an unauthorized use of an existing work.

In exercising the discretion permitted by Section 505, district courts should be required to apply the same standard to prevailing defendants as to prevailing plaintiffs, and the presumption should be that a prevailing party be awarded its fees unless special circumstances are present. Congress has expressed no intent to limit awards of attorney's fees to prevailing plaintiffs or to exceptional cases. Absent such intent, it should be generally appropriate to award reasonable fees to the prevailing party. The Court should thus reverse and remand to the district court with a direction to enter an award of attorney's fees to Fogerty.

X.

ARGUMENT

A. The Court Should Adopt an Evenhanded Approach to Awards of Attorneys Fees Under Section 505.

1. Nothing in the Legislative History of Section 505 Supports the Dual Standard of the Ninth Circuit.

In interpreting a federal statute, the Court must look first to the express language of the statute, and then to the legislative history of the statute if the statutory language is unclear. *See, e.g. Blum v. Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984) (where resolution of a question of federal law turns on a statute and the intention of Congress, court looks first to the statutory language and then to the legislative history if the statutory language is unclear). Looking first to the express language of the statute, the district court is authorized to award fees to the "prevailing party." Such language supports an evenhanded, rather than a dual, standard.

Even if this statutory language was unclear, there is no support in the legislative history for a dual standard. The "dual" or "asymmetrical" approach adopted by the Ninth Circuit is, in essence, a judicial gloss on the attorney's fee provision of the Copyright Act which imposes additional considerations of policy upon fee awards to defendants which are not expressed in the Copyright Act or in the legislative history of Section 505.

The legislative history of Section 505 in connection with the adoption of the 1976 Copyright Act is virtually

non-existent. The legislative history of Section 505 states in full:

> "Under section 505 the awarding of costs and attorney's fees are left to the court's discretion, and the section also makes clear that neither costs nor attorney's fees can be awarded to or against 'the United States or an officer thereof.' "

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 163, reprinted in 1976 U.S. Code Cong. & Admin. News 5779, 5779. *See also* Elden Dale Golden, *The Discretionary Award of Attorney's Fees under the Copyright Act*, 13 Hastings Comment L.J. 411, n. 31 (1991). This lack of legislative history has been noted and discussed by many commentators and in many of the cases,[11] and the legislative history of copyright acts proposed prior to the 1976 Act is not much more enlightening. "In the series of background studies that kicked off the revision process, attorney's fees receive only a lick and a polish, with no discussion of the philosophy underlying the relevant statutory provisions."[12]

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[11] Peter Jaszi, *505 and All That – The Defendant's Dilemma*, 55 Law & Contemp. Probs. 107 (1992) (provision carried forward "with little discussion of any kind"); Elden Dale Golden, *The Discretionary Award of Attorney's Fees under the Copyright Act*, 13 Hastings Comm/Ent L.J. 411 (1991) ("Congress has given no guidance in the statute . . . or in the legislative history . . . as to what standard should be followed or as to the purpose of the statute . . . ").

[12] Jaszi, *supra* at n. 2. Jaszi analyzes the legislative history of Section 505 as follows:

"An equally 'even-handed' approach characterizes the 1961 Register's Report on Copyright Law Revision: '[t]he costs involved in an infringement action are usually relatively small.

In fact, the pre-1976 Act studies lend more support to an evenhanded than to a dual standard for awards of attorney's fees to prevailing plaintiffs and defendants. As one commentator has stated:

> "Quoting from the 1917 edition of Weil on Copyright, the most directly relevant study noted simply that attorney's fees may be recoverable because 'expense of any litigation is considerable [so that] it may not pay a party to defend rights, even if valid, a situation opposed to justice.' Therefore, '[i]t is increasingly recognized that the person who forces another to engage counsel either to vindicate, or defend, a right should bear the expense of such engagement and not his successful opponent.' Notably, perhaps, this passage treats the attorney's fee provision as of equal potential applicability to

But the prosecution or defense of a copyright suit may entail a good deal of work and expense, and an award of attorney's fees can be substantial.' Report of the Register of Copyrights on the General Revision of the Copyright Laws, 87th Cong, 1st Sess 30 (1961) (supporting the retention of provisions allowing discretionary awards of attorney's fees in new legislation).

"Although private parties proposed that the attorney's fees provisions be amended to make awards mandatory in case of the infringement of registered words, see Copyright Law Revision, Part IV: Further Panel Discussion and Comments on the Preliminary Draft for Revised U.S. Copyright Law, 86th Cong, 2d Sess 69 (1964) (letter from Ernest S. Myers noted), the language of the Preliminary Draft was to be carried forward, without substantial change in this particular regard, through the successive drafts which culminated in the 1976 Copyright Act. Indeed, the language of what would become Section 505 was unchanged after 1964. Neither the House Report nor the Senate Report on the final legislation contains any substantive discussion of the provision." Jaszi, *supra* at n. 2 (1992).

> plaintiffs and defendants. William S. Strauss, *The Damages Provisions of the Copyright* Law, Copyright Revision Study No 22, 86th Cong, 2d Sess 36 (1960)."

Jaszi, *supra* at n. 2.

2. Congress Did Not Intend To Adopt A Dual Standard When It Enacted Section 505.

As a close reading of both the report delivered to Congress by the Register of Copyright in 1961 (the "1961 Report"), *reprinted in* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 163 (1976), and cases involving the award of attorney's fees decided under the 1909 Act demonstrates, neither the 1961 Report nor the majority of attorney's fees cases decided under the 1909 Act implicate, much less expressly endorse, the dual standard for the award of attorney's fees under the 1976 Act that has been embraced by the Ninth Circuit. The 1961 Report of the Register of Copyrights draws no distinction whatsoever between the entitlement of plaintiffs and defendants to attorneys' fees under the 1909 Act. The 1961 Report is nothing more than an endorsement of the discretion of federal judges with respect to the award of attorney's fees under the 1909 Act and is not an attempt to formulate legislative standards governing such awards.

While the cases are far from uniform, there is authority in the pre-1976 Act case law which supports the notion that the provision of the Copyright Act allowing awards of attorney's fees was an adoption of the English rule for fee awards with the purpose of making the prevailing party "whole." In *Lewys v. O'Neill*, 49 F.2d 603 (S.D.N.Y.

1931), the District Court for the Southern District of New York awarded attorneys' fees to a prevailing defendant in a copyright infringement action. While the court's lengthy opinion supports its comment that the plaintiff's claims were "wholly preposterous", the costs incurred by the defendant in defending his copyright, rather than the frivolousness of the plaintiff's claims, provided the justification for the award of attorney's fees. The court stated:

> "The plaintiff, therefore, has played for high stakes and lost. The expense of their success will necessarily bear heavily on the defendants.
>
> Fortunately in copyright cases Congress has seen fit to leave the courts free to adopt the wise English practice of throwing a large part of the expense of litigation on the unsuccessful party.
>
> Section 40 of the Copyright Act of March 4, 1909 provides: 'In all actions, suits or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs.' "

49 F.2d at 618.

Taken as a whole, pre-1976 case law dealing with attorneys' fees under the 1909 Act demonstrates merely that courts awarding or declining to award attorneys' fees to prevailing parties justified their decisions with reference to such a variety of policy analyses and legal principles that no clear standard that could have put Congress "on notice" of any prevailing interpretation of the attorneys' fees section of the 1909 Act can be honestly said to have emerged from pre-1976 Act case law.

Not only was there no clear standard for awards of attorney's fees in copyright actions prior to the 1976 Revision, there is also absolutely no evidence that Congress had any awareness of the varying applications of the attorney's fees provision among the district courts. Absent any evidence of such awareness in the legislative history, it cannot be assumed that Congress intended the 1976 Revision to ratify any particular interpretation of the fee-shifting provision. In the absence of any applicable legislative history, the Court is left to determine the intent of Congress from the language of the statute and the legal context in which the section was enacted.

3. An Evenhanded Approach is Called For by the Policies Underlying the Copyright Act.

a. The Purpose of the Copyright Act is to Promote the Progress of the Arts, and a Successful Defense of a Copyright Infringement Action Furthers that Purpose.

In determining the appropriate standard to govern the district courts' discretion in awarding attorney's fees under Section 505, this Court must look to the policies underlying the Copyright Act.

> "The copyright statutes ought to be reasonably construed, with a view to effecting the purposes intended by Congress. They ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant."

Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 346, 28 S.Ct. 722, 724, 52 L.Ed. 1086 (1908).

The argument in favor of the "dual" standard misstates or ignores the policies behind the Copyright Act. Article 1, Section 8, Clause 8 of the United States Constitution grants Congress the authority to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." In *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 95 S.Ct. 2040, 45 L.Ed.2d 84 (1975), the Court articulated the policies underlying the Copyright Act:

> "The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. [¶]
>
> The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. 'The sole interest of the United States and the primary object in conferring the monopoly,' this Court has said, 'lie in the general benefits derived by the public from the labors of authors.' "

Id. 422 U.S. at 156 (footnotes omitted), quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127, 52 S.Ct. 546, 547, 76 L.Ed. 1010 (1931).

The Constitution refers to Congress "securing" the authors a copyright. At the time of the enactment of the United States Constitution, there had been a long history in England of copyrights[13] and exclusive rights granted to authors and publishers.[14] What the enactment of the federal copyright scheme did was to "secure" those rights, *i.e.*, acknowledge or confirm them. The federal scheme also limited those rights. *See, e.g., Graham v. John Deere Company of Kansas City*, 383 U.S. 1, 5, 86 S.Ct. 684, 687, 15 L.Ed.2d 545 (1966) (constitutional provision which gives rise to federal patent and copyright power "is both a grant of power and a limitation").

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[13] The two competing policies which are balanced by both the U.S. and British copyright laws can be seen in two arguments made by Mccaulay in the House of Commons:

> "The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures."

56 Parl. Deb. (3d ser.) 341, 350 (1841) (debate on lengthening the statutory term of copyright).

> "The advantages arising from a system of copyright are obvious. It is desirable that we should have a supply of good books; we cannot have such a supply unless men of letters are liberally remunerated: and the least objectionable way of remunerating them is by means of copyright."

56 Parl. Deb. (3d ser.) 341, 346 (1841). Quoted in Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 Wayne L. Rev. 1119, 11120, n. 1,3.

[14] *See* Abrams, *supra* at n. 14.

Copyrights granted under the federal statute are limited in time and in scope in order to balance the benefits to the authors of avoiding copying and the benefits to the public of availability of others' creative efforts. There is a benefit to the public in having works in the public domain.[15] It can be said that copyright is a monopoly carved out of the public domain. "The public domain is the law's primary safeguard of the raw material that makes authorship possible."[16] By the limitation of the monopoly rights granted, others are free to engage in commerce with the knowledge that they can use ideas in their own works, even though those ideas may have appeared in other works.

The Court further discussed the policies underlying the Copyright Act in *Mazer v. Stein*, 347 U.S. 201, 219, 74 S.Ct. 460, 471, 98 L.Ed. 630 (1954) as follows:

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[15] David Lange, *Recognizing the Public Domain*, 44 Law & Contemp. Probs. 147 (1981).

[16] Jessica Litman, *The Public Domain*, 39 Emory L.J. 965, 967 (1990). As Professor Litman explains:

> "To say that every new work is in some sense based on the works that preceded it is such a truism that it has long been a cliche, invoked but not examined. But the very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea. Composers recombine sounds they have heard before, playwrights base their characters on bits and pieces drawn from real human beings and other playwrights' characters . . . This is not parasitism: it is the essence of authorship. And, in the absense of a vigorous public domain, much of it would be illegal."

(footnotes omitted) *Op. cit.* at 966-967.

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."

This Court reiterated in *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, ___ U.S. ___, 111 S.Ct. 1282, 1289-90, 113 L.Ed.2d 358 (1991) that the

> "primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.' To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. . . . This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art."

Again, in *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429, 104 S.Ct. 774, 782, 78 L.Ed.2d 574 (1984), the Court held:

> "The mononoply privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired. . . . "

In other words, Congress' preemption of the field of copyright was not just an expansion of rights, but also a clarification of the limits on such rights. However, the legal system has no policy incentive to put its thumb on either side of the scales in favoring either the expansion of copyrights (which is normally a plaintiff's position) or the restriction of copyrights (which is normally a defendant's position). By litigating copyright actions, both plaintiffs and defendants provide a benefit to the general public by clarifying elements of the statutory scheme governing copyrights.

As one commentator has put it:

> "Section 505, as conventionally interpreted, operates to encourage litigation by copyright plaintiffs; those same interpretations, however, have the dysfunctional effect of chilling the vigorous assertion of various defenses to claims of infringement. It may not be too much to suggest that the continuing health of American copyright law depends, in significant part, on our success in righting this skewed balance[17] . . . [¶]
>
> "Vigorous, persistent assertion of defenses to claims of infringement is part of the life blood of our copyright system. To the extent that the rules of the game of copyright litigation, including Section 505, tend to discourage the assertion and litigation of meritorious defenses, the resulting tendency toward settlement will produce, inevitably, a kind of systemic anemia. Settlements, whatever their value to the immediate parties, do not benefit the public at large by

[17] *See* Jaszi, *supra* at 108, n. 11.

> helping to mark out the outer contours of copyright protection; indeed, the practical effect of some settlements may be to suggest that those contours are more generous than is in fact the case."[18]

An evenhanded attitude is particularly important as the business world develops "works" in new areas of technology, particularly in the areas of electronics, computers and biotechnology, since it is necessary to balance the claims of the public for widespread distribution with the claims of authors and the media for trade monopolies.[19] The legal system has no legitimate interest in having a system of litigation which favors the expansion of copyrights or the restriction of copyrights.[20] It does have

[18] *See* Jaszi, *supra* at 112, n. 11.

[19] *See* Abrams, *supra* at 1186, n. 14:

> "Today's exploding technologies of videotape and audio recording, cable television, and other advances in media and repography, have confronted us with major problems which require accommodation of the conflicting claims of the public for widespread distribution and easy access to intellectual works with the claims of media and authors for trade monopolies."

[20] Justice Steven's concurring opinion in *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 653, 103 S.Ct. 2058, 2061, 76 L.Ed.2d 211 (1983), discusses this concept in the context of patent litigation. In *General Motors*, the Court held that when Congress wishes to limit an element of recovery, it says so explicitly, and thus awards of prejudgment interest under section 284 of the Patent Act were found not to be restricted to exceptional circumstances, whereas awards of attorney's fees under the Act are expressly so limited. In his concurring opinion, Justice Stevens emphasized "the public function served by patent litigation." *Id.*, 461 U.S. at 658. Justice Stevens noted that a patent simply represents a conclusion by the Patent Office

an interest in a level playing field in which the rights and limits of copyrights in these new works are defined, and part of such a level playing field is the application of Section 505 in an evenhanded manner as between prevailing plaintiffs and defendants.

b. The Justifications Set Forth In Support of a Dual Standard Do Not Apply in the Context of Copyright Actions Like the Present One, Which Involve Competing Copyright Claims.

The rationale that has developed to justify the dual standard of the Ninth Circuit centers on the argument that where a plaintiff prevails, a copyright has been "defended" or "enforced" and therefore, fees should be routinely or generously granted. However, so the argument goes, when a defendant prevails no copyright has been "defended" or "enforced," and therefore no "purpose" of the copyright act has been promoted.

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made in an *ex parte* proceeding without the aid of arguments by parties interested in proving patent invalidity, *citing Lear, Inc. v. Adkins*, 395 U.S. 653, 670, 89 S.Ct. 1902, 23 L.Ed.2d 610 (1969), and concluded that a patent challenge through litigation in the courts advances the general public interest by permitting a more informed decision regarding the merits of a particular patent. *Id.*, 461 U.S. at 658.

> "[A]s we have long recognized, '[i]t is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly. . . . ' "

Id., quoting *Pope Manufacturing Co. v. Gormully*, 144 U.S. 224, 234, 12 S.Ct. 632, 636, 36 L.Ed. 414 (1892).

The justification for the "dual" approach has been set forth by one commentator as follows:

> "The purpose of the Copyright Act is succinctly expressed in the United States Constitution. Article I, Section 8, Clause 8 of the Constitution gives Congress the power '[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.' It is axiomatic that the rights and powers granted by the Constitution should be construed liberally to 'best promote the very objects of the people . . . [and] promote or secure their rights, property, or liberty.' This purpose, recognized by many courts, has been well served by American copyright law, which 'seeks to vindicate the economic . . . rights of authors.' Beyond securing economic rights, suits challenging copyright infringement advance Congress' clear intent to encourage intellectual creation by protecting the exclusive rights of authors 'to the fruits of their respective works.' An award of fees to a prevailing defendant does not further this Congressional purpose. Economic rights are not vindicated when the defendant prevails, because the defendant has not availed himself of the protection of the Copyright Act."

Note: *Awarding Attorneys' Fees in Copyright Infringement Cases: The Sensible Use of a Dual Standard*, 51 Albany Law Review 255 (1987).

This argument is, simply, wrong. A defendant in a copyright action usually has a copyright of his own which has at least been "defended," if not "enforced," by the action. The court in *Lieb v. Topstone Industries*, 788 F.2d

151, 155 (3d Cir. 1986) rejected the "divining" in *Diamond v. Am-Law Publishing Co.*, 745 F.2d 142 (2d Cir. 1984), of an intent by Congress to encourage copyright holders to pursue infringers by noting that "in many cases defendants are holders" of copyrights. 788 F.2d at 155.

This can be clearly seen in this case. John Fogerty has a copyright to "Old Man" which was defended and upheld by his defense and the verdict in his favor in the action below. He has proven that "Old Man" was an original work, that it was not copied as alleged by Fantasy, and that the Warner Defendants were free to use the song on the "Centerfield" album. Similarly, the Warner Defendants were copyright proprietors and availed themselves of the Copyright Act. Fogerty's successful defense promoted the purpose of the Copyright Act as well as any successful prosecution of a copyright claim by a plaintiff. In contrast, a decision in *Fantasy's* favor in this case would have chilled not only Fogerty's future creative endeavors, but also those of other artists who have carved out a distinctive style in their works.

This case points out the faults of the supposed "access-to-legal-recourse" and "pro-artist" dual approach. The mere status as plaintiff or defendant should not confer such built-in advantages in litigating. After receiving threats from plaintiff, had the Warner Defendants and Fogerty initiated this action as one for declaratory relief that "Old Man" was an independent, original work and did not infringe "Jungle," they would have been the "plaintiffs" and Fantasy the "defendant" in a civil action brought under the Copyright Act. Under the Ninth Circuit's dual approach, had the Warner Defendants and Fogerty prevailed as plaintiffs at trial of that

copyright action for declaratory relief, they would have been entitled to fees as a matter of course without showing any bad faith or frivolity. In all other respects, the substantive claim asserted by the respective parties would have been exactly the same, but fees would be recoverable merely on the basis of a race to the courthouse.

Any policy so easily circumvented is obviously flawed. There is no reason why the prevailing authors and owners in this case should be denied legal fees simply because they are labeled "defendants" when other "authors and owners" who prevail recover fees merely because they are labeled "plaintiffs."

Application of anything other than an evenhanded approach in cases like this results in a tactical windfall to plaintiffs such as Fantasy. It is impossible for a defendant who has written both the alleged infringed and alleged infringing works to extricate himself from an infringement action before trial. The simple elements of an infringement action are access and similarity to a prior copyrighted work, from which copying may be inferred. *Pasillas v. McDonald's Corp.*, 927 F.2d 440, 442 (9th Cir. 1991); *Shaw v. Lindheim*, 908 F.2d 531, 534 (9th Cir. 1990). Under these circumstances, where the defendant authored both works, (a) the requirement of access is necessarily met, (b) substantial similarity of admittedly objectively similar works, being by the same author and in the same style, is required to be decided at trial and not on motion, *see Shaw, supra*, 908 F.2d at 541, and (c) the doctrine of "subconscious copying," *see ABKCO Music Inc. v. Harrisongs Music Ltd.*, 722 F.2d 988 (2d Cir. 1983),

permits a trial even where the author expressly denies copying.

When the copyright owner of an artist/author's prior work chooses to sue, it is granted a free roll of the dice to prevent that artist/author from continuing to create and to compete with new copyrighted works similar to his old works. The owner of the copyrights to the prior works can file infringement claims with the comforting knowledge that, as the law presently stands in the Ninth Circuit, (1) its case almost certainly will get to trial, and (2) it need not worry about the award against it of statutory attorneys' fees should the suit fail. Armed with knowledge of this legal advantage, plaintiffs in Fantasy's position are free to exert economic leverage on the author in a manner never contemplated by the Copyright Act.

As an example, in this case, Fantasy refused to pay Fogerty over $1.4 million in royalties it admittedly owed him until resolution of this action, while causing Fogerty to incur some $1 million in fees and costs defending the action. While Fogerty had the wherewithal to withstand this economic coercion this time, many other authors whose interests are meant to be protected and preserved by the Copyright Act will not be able to do so and will succumb to the economic power of those stronger in the marketplace.

Because a defendant in a self-copying case like this one is unlikely to prevail on a motion to dismiss or for summary judgment, it is also almost impossible under the present Ninth Circuit standard for awarding attorney's fees in copyright actions for such a defendant to obtain an award of the attorney's fees he incurred in defending

himself. The District Court's ruling in this action (App. A-23 at A-31 to A-32) demonstrates the difficulty encountered by a prevailing defendant who seeks an award of fees under Section 505, since the fact that the plaintiff was able to get to the jury was relied upon to support both the conclusion that the case was not frivolous and the conclusion that it was brought in good faith, even where the defendants were forced to incur over $1 million in attorney's fees to defend themselves, where the jury was able to decide the lack of merit to the action in two hours, and where there was a history of animosity between the parties.

Fogerty's predicament when embarking upon new compositions must also be considered. According to the district court, he may be liable for infringement of a work even though he is the author of and beneficial copyright owner of his prior works *and* he may infringe those works by subconsciously copying himself. Fogerty must factor into this equation the fact that the owners of the rights to his earlier works have a history of animosity towards him and have demonstrated their willingness to sue for infringement. Fogerty is thus placed in a position as an artist where he must create new music completely dissimilar to any of his earlier, successful works if he wishes to avoid legal attack and the accompanying expense of attorney's fees in defending himself against the claims of those who control the copyrights to his early creativity. This is a totally undesirable perversion of copyright law and contrary to the purpose of the Copyright Act, "which is to encourage the production of the arts." *Warner Brothers Pictures Inc. v. Columbia Broadcasting System*, 216

F.2d 945, 950 (9th Cir. 1954), *cert. denied*, 348 U.S. 971, 75 S.Ct. 532, 99 L.Ed. 756 (1955).

In comparison, the appropriateness of the evenhanded approach to interpreting Section 505 is well summarized by the decision in *Cohen, supra*, 617 F.Supp. at 623:

> " . . . Absolutely nothing in the statute [17 U.S.C. 505] or in the legislative history gives to courts any authority to distinguish between an award of attorneys' fees to a prevailing defendant and an award to a prevailing plaintiff. . . . Nor am I persuaded that a distinction should be made in an award because there is some need to encourage plaintiffs to file suit which differs in public benefit from a need to encourage defendants to defend suits. Copyright laws are not intended for the benefit of prospective plaintiffs. Who may be a plaintiff and who may be a defendant doesn't define the difference between good guys and bad guys. Nor can we assume that plaintiffs are inherently impecunious while defendants have deep pockets. Entities which sue for copyright infringement as plaintiffs can run the gamut from corporate behemoths to starving artists; the same is true of prospective copyright infringement defendants. Nor can it be argued on any principled ground that society is better off when a plaintiff files and wins a copyright infringement suit than when a defendant defends and wins a copyright infringement suit. Indeed, if there is any difference between the two, we must remember that it wasn't the defendant who chose to litigate. . . . The statute surely says nothing more or less than that a judge is to

> use an evenhanded approach in awarding attorneys' fees to a prevailing party. [Citations omitted.] . . . Plaintiff caused defendant considerable expense and trouble in plaintiff's losing cause. . . . In other words, plaintiff lost and deserved to lose and there is no reason why the discretion of the court should not be exercised to award fees in accordance with the provisions of the statute."

Nowhere are the *Cohen* court's points more valid than this case. A tremendously gifted artist, Fogerty, whose rights the Copyright Act is designed to protect (even under "dual" theorists' thinking), is the defendant. Plaintiff is a wealthy corporation with the animosity and wherewithal to prosecute numerous claims against Fogerty. What coherent copyright policy concerns justify conferring a benefit on Fantasy and its principals for their actions in conducting this lawsuit? This case is one which demonstrates the need for an "evenhanded" approach to the exercise of the district court's discretion under Section 505.

c. The Standards Applicable to Fee Awards in the Context of Other Statutes, Such as the Civil Rights Act, Are Based Upon Policy Considerations Which Do Not Apply to Copyright.

The plain language of Section 505 leads to the conclusion that Congress intended an evenhanded approach to the award of fees. However, some courts adopting the dual standard in interpreting Section 505 have analogized

to and relied upon this Court's interpretation of attorney's fee provisions in the context of civil rights legislation. Analogies to the interpretation of similar language in distinctly different statutes, such as the Civil Rights Act of 1964, are improper and must be rejected.

The Civil Rights Act created rights for individuals where none were recognized before. The Copyright Act "secured" to individuals specific limited rights in lieu of their common law rights. The Copyright Act struck a balance between allowing the general public access to creative works and providing a limited monopoly to artists to allow them to profit from the exploitation of their works. There are no similar balancing considerations in the civil rights area.

In refusing to extend the inherent power of the courts to award attorney's fees to the prevailing party under a "private attorney general" theory where the applicable statute fails to do so, the Court in *Alyeska Pipeline Service Co. v. Wilderness Society* noted that Congress has made

> "specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights. These statutory allowances are now available in a variety of circumstances, but they also differ considerably among themselves."

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 260-61, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) (footnote omitted). The Court recognized that in some cases, such as cases brought under the antitrust laws, Congress has made awards of attorney's fees to a prevailing plaintiff mandatory. In other cases, such as in patent litigation, the prevailing party may only be awarded attorney's fees "in

exceptional cases." Other statutes, such as the Civil Rights Act of 1964, allow for awards of attorney's fees to the prevailing party in the discretion of the court. *Id.*, 421 U.S. at 261-262. The Court concluded:

> "Under this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine. [¶] It is true that under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation. Fee shifting in connection with treble-damages awards under the antitrust laws is a prime example; . . . and we have noted that Title II of the Civil Rights Act of 1964 was intended 'not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.' "

Id., 421 U.S. at 262-263 [footnote and citations omitted, quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968)].

Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754, 109 S.Ct. 2732, 105 L.Ed.2d 639 (1989) addressed the question of under what circumstances attorney's fees could be awarded under Section 706(k) of the Civil Rights Act of 1964 against intervenors who had not been found to have violated the Civil Rights Act or any other federal law. In discussing the limits placed on the district courts' discretion in awarding attorney's fees under Section

706(k), the Court noted that such limits have been found "in 'the large objectives' of the relevant Act, which embrace certain 'equitable considerations.' " *Id.*, 109 S.Ct. at 2735 (citations omitted).

In this case, then, the "large objectives" and "equitable considerations" underlying the *Copyright Act* must be considered in determining what, if any, limits should be placed upon the district courts' discretion in awarding attorney's fees under Section 505 of the Copyright Act. In relying upon cases interpreting attorney's fees provisions of civil rights and other federal laws, those Circuits adopting the "dual standard" for awards of attorney's fees have overlooked or ignored the fact that the Copyright Act embodies very different purposes and policies than those underlying other federal statutes.

The purpose of statutes such as the Civil Rights Act bears little similarity to that of the Copyright Act. While the Copyright Act was designed to promote the creation of new artistic works, the Civil Rights Act was designed to redress violations of civil rights and to provide access to the courts to those who have been discriminated against. *See, e.g., Dennis v. Higgins*, 498 U.S. 439, 111 S.Ct. 865, 879, 112 L.Ed.2d 969 (1991) (Justice Kennedy, dissenting) (awards of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, codified at 42 U.S.C. § 1988, "encourage[] vindication of federal rights which, Congress recognized, might otherwise go unenforced because of the plaintiffs' lack of resources and the small size of any expected monetary recover") (citing S.Rep. No. 94-1011, p. 6 (1976), U.S.Code Cong. & Admin.News 1976, p. 5908). In addition, while the legislative history of the Civil Rights Act clearly *supports* a dual standard in

cases brought under that Act, no such support appears in the legislative history of the Copyright Act.

In *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978), the Court addressed the standard applicable to awards of attorney's fees to prevailing defendants in actions brought under Title VII of the Civil Rights Act of 1964. The Court first noted that it was established that under § 706(k) of Title VII,[21] a prevailing plaintiff ordinarily was to be awarded attorney's fees in all but special circumstances. *Id.* 434 U.S. at 417. The Court then rejected the argument by the prevailing defendant that the plain meaning of the statute, in making no express distinction between prevailing plaintiffs and defendants, required a conclusion that plaintiffs and defendants should be subject to the same standard in awarding fees. *Id.*, 434 U.S. at 418.

The Court in *Christiansburg* found that there were two strong equitable considerations in favor of attorney's fee awards to prevailing Title VII plaintiffs that are not present with respect to prevailing Title VII defendants: (1) "the plaintiff is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority;' " and (2) "when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law." *Id.* The Court held that different equitable considerations are present where a

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[21] Section 706(k) of Title VII provided in full:
"In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs . . . "

Title VII defendant prevails, and concluded that in Title VII actions, a district court may in its discretion award attorney's fees to a prevailing defendant "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.*, 434 U.S. at 421.

The justification for the dual standard adopted by this Court in *Christiansburg* for Title VII actions simply does not apply to actions brought under the Copyright Act. Unlike the Civil Rights Act, the Copyright Act was not enacted to provide a mechanism for enforcing and vindicating individual rights. Rather, the Copyright Act establishes the parameters of a limited monopoly to those who create original works in order to promote the creation of new works. Copyright plaintiffs are not necessarily at an economic disadvantage to copyright defendants with respect to their abilities to litigate their claims. Plaintiffs in copyright actions are not acting as "private attorney generals" to enforce federal laws, nor are defendants in copyright actions necessarily the violators of federal laws. Rather than seeking to punish violations of federal law, copyright actions generally serve the purpose of clarifying the scope of the limited monopoly created by the Copyright Act. This purpose is furthered whether a copyright plaintiff or defendant prevails, and, unlike actions brought under the Civil Rights Act, there is no legislative history or underlying policy rationale which justifies a distinction between prevailing plaintiffs and defendants in awarding attorney's fees under Section 505 of the Copyright Act.

The defendants in *Lieb, supra,* tried to analogize Section 505 to the Civil Rights Attorney's Fee Awards Act of

1976 (currently codified at 42 U.S.C. § 1988), which has a legislative history that expressly recognizes and supports a double standard in fee awards to prevailing plaintiffs and prevailing defendants. The *Lieb* court rejected this argument, holding that "[s]ubstantially different policy considerations are present; moreover, in the reenactment of the Copyright Act that same year, 1976, Congress did not refer to a double standard." *Lieb, supra,* 788 F.2d at 155.

In rejecting this analogy between different attorney's fee statutes, the *Lieb* court also stated, " 'The public policies to be subserved by the sanction of awarding counsel fees may vary from field to field. Unless cognate policies are to be enforced, the decisions in one field would not be valid analogies to another.' " *Id.* n. 1 (quoting *Cloth v. Hyman,* 146 F.Supp. 185, 192 n. 6 (S.D.N.Y. 1956)). *See also Cohen v. Virginia Elec. & Power Co.,* 617 F.Supp. 619 (E.D.Va. 1985), *aff'd,* 788 F.2d 247 (4th Cir. 1986) (distinguishing attorney's fees under civil rights acts on grounds that legislative history of Copyright Act does not indicate any congressional disposition to limit attorney's fees to defendants).

B. This Court Should Adopt An Evenhanded Approach Which Generally Awards Fees To The Prevailing Party.

The language of Section 505 used by Congress is not restrictive, indicating that there was no intent by Congress to restrict awards of attorney's fees in copyright cases. In contrast, the Lanham Act, codified at 15 U.S.C. §§ 1051-1127 (1988), and the Patent Act, codified at 35

U.S.C. §§ 1-376 (1988), the bodies of law most analogous to the Copyright Act, both state that "[t]he court *in exceptional cases* may award reasonable attorney fees to the prevailing party." 15 U.S.C. § 1117(a); 35 U.S.C. § 285.

The American legal system has traditionally followed the rule that the parties to a lawsuit generally bear their own legal fees. In exceptional cases, fees may be awarded. Fees may also be recovered where they are specially provided for by statute or agreement of the parties in a contract. This is referred to as the "American Rule." *See, e.g., Alyeska, supra,* 421 U.S. at 247. In Great Britain, the rule is to the contrary and attorney fees are generally awarded to the prevailing party. *Id.*, 421 U.S. at 247, n. 18.

Mountains of trees and oceans of ink have been spent on the discussion of which system better promotes justice and advances desirable social ends.[22] Although some

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[22] *See, e.g.*, Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J.L. Econ. & Org. 345 (1990); Richard D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. Econ. Literature 1067 (1989); Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing The Problem*, 3 Duke Law Journal 435 (1986); Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237 (1985); Symposium, *Attorney Fee Shifting*, Law & Contemp. Probs., Winter 1984, at 1; I.P.L. P'ng, *Stategic Behavior in Suit, Settlement, and Trial*, 14 Bell J. Econ. 539 (1983); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 University of Pennsylvania Law Review, 636 (1974); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. Legal Stud. 399 (1973); John P. Gould, *The Economics of Legal Conflicts*, 2 J. Legal Stud. 279 (1973); William M. Landes, *An Economic Analysis of the*

economists and jurists argue to the contrary,[23] it is generally felt that the British rule promotes settlement and thereby reduces litigation.[24] Primarily for this reason, many have called for a general abolition of the American rule and adoption of the British rule.[25]

The concept underlying the British system is that unless there is an award of fees to the prevailing party, that party will not be made "whole" by the legal system. Where a plaintiff recovers a certain amount of money, if

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Courts, 14 J.L. & Econ. 61 (1971); Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 California Law Review, 792 (1966); McCormick, C.T., *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 Minnesota Law Review, No. 6:619 (1931).

[23] *See, e.g.* Avery Katz, *Measuring the Demand for Litigation: Is the English Rule Really Cheaper?*, 3 J.L. Econ. & Org. 143 (1987); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. Legal Stud. 399 (1973); Richard A. Posner, *Comment on Donohue*, 22 Law & Socy. Rev. 927 (1988).

[24] *See, e.g.* Smith, *Three Attorney Fee-shifting Rules and Contingency Fees: Their Impact on Settlement Incentives*, 90 Mich. L. Rev. 2154 (1992); John J. Donohue III, *Opting for the British Rule, or If Posner and Shavell Can't Remember the Coase Theorem, Who Will?*, 104 Harv. L. Rev. 1093 (1991).

[25] *See, e.g.* Philip S. Figa, *The "American Rule" Has Outlived its Usefulness; Adopt the "English Rule,"* Natl. L.J., Oct. 20, 1986; Phillip A. Middleton, *To the Victor, the Spoils: Proposal to Abandon the American Rule*, 41 Mo. Bar J. 79 (1985); Mathew B. Wills & Neil Gold, *Attorneys' Fees in Litigation: Time to Discard the American Rule?*, Litig., Spring 1978; Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 California Law Review, 792 (1966); Kuenzel, *The Attorney's Fee: Why Not A Cost of Litigation?*, 49 Iowa Law Review, 75 (1963). Others have advocated adoption of a modified British rule. *See President's Council On Competitiveness, Agenda For Civil Justice Reform in America* 1 (1991).

he has to pay a portion of it to his attorney without reimbursement by the defendant, he will not fully recover for his loss. Similarly, if a defendant prevails but has to pay attorney's fees, he is to that extent a "loser," even though he "won" the lawsuit.

The concept underlying the American system is that poor plaintiffs will be deterred from filing lawsuits if they face the threat of having to pay an award (often substantial) of attorney fees to the prevailing defendant's counsel.[26] The American rule is premised on the policy that dispensing "justice" to the plaintiff should not be chilled by the fear of an award of legal fees.[27] Defenders of the American rule can be characterized as "plaintiff oriented" and defenders of the British system as "defense oriented," although prevailing plaintiffs would recover fees under the British system and losing defendants do not have to pay legal fees to the plaintiff under the American system.[28]

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[26] For example, Ralph Nader denounced a Bush administration proposal to move partially toward the British rule, saying "corporate goliaths" would use the rule to "intimidate victims." Public Citizen press release (Aug. 13, 1991), quoted in Daily Rep. For Executives (BNA), Aug. 14, 1991, at A3 and in Smith, *supra* at 2155, n.6.

[27] *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967). This suggestion has been said to be "not only questionable economics but also a pure anachronism." Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 44 Law & Contemp. Probs. 9, 10 (1981).

[28] Under the American rule, many defense counsel complain about the coercion of defendants to settle "strike" suits resulting from the threat of incurring substantial legal fees, which they will not be able to recover from the plaintiff, even though the plaintiff's case lacks merit.

Whatever may be the outcome of this great debate, by enacting Section 505 without any specific or further discussion of its intention, Congress was making a deliberate choice in the area of copyrights to opt for the "British Rule" in lieu of the "American Rule," *i.e.*, that the general rule should be to award fees to the prevailing party, whether it be the plaintiff or defendant, absent exceptional circumstances. *Cf. Blanchard v. Bergeron*, 489 U.S. 87, 89 n. 1, 109 S.Ct. 939, 942, 103 L.Ed.2d 67 (1989) (although 42 U.S.C. § 1988 allows awards of attorney's fees to prevailing party in discretion of court, discretion is not without limit and prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust"); Philip S. Figa, *The "American Rule" Has Outlived its Usefulness; Adopt the "English Rule,"* Natl. L.J., Oct. 20, 1986, p. 13 ("This concept of fee-shifting is discretionary by English statute; in practice, however, such awards are the norm").

C. The Court Should Direct That an Award of Fees Be Entered in Favor of Fogerty.

Because the appropriate standard governing the district court's discretion under Section 505 should be an evenhanded standard under which the prevailing party, whether plaintiff or defendant, is awarded its fees absent unusual circumstances, the Court should reverse and remand this action to the district court with a direction to enter an award of attorney's fees in favor of Petitioner.

This is not a case where "exceptional circumstances" exist which would warrant denial of an award of fees. Applying the considerations discussed above, this case represents the paradigm case for the award of attorney fees to the prevailing party: Fogerty.

Fogerty has incurred more than $1,000,000 in legal fees and costs which he has sought to have awarded to him pursuant to Section 505. This is an enormous sum for an individual to have to incur to defend against a meritless copyright infringement claim. This is a particularly onerous burden for Fogerty to bear in light of the animosity between Fogerty and Fantasy and Zaentz.[29] Having litigated this case through to a successful conclusion, Fogerty should not wind up a "loser" by having to bear the unjust burden of the enormous fees and costs he had to incur.

In this action, Fantasy claimed that "Old Man" was a copy of "Jungle," and Fogerty successfully demonstrated that "Old Man" was an originally-created work, thereby validating Fogerty's copyright in "Old Man." Under such circumstances, Fogerty's vigorous defense of the copyright action furthered the purposes of the Copyright Act in promoting the progress of the arts and protecting an author's original creation. Fogerty is thus entitled to be

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[29] Fogerty had a serious argument that this action had been brought in bad faith against him by Zaentz in retaliation for what Zaentz felt were the defamatory lyrics in "Zanz Kant Danz," a song on the same album. (JA 13-24; RT 908-911; 1136-1137.) This argument was rejected by the District Court, seemingly on the ground that since the lawsuit was not frivolous, it could not have been brought in bad faith. (App. A-23 at A-30 to 32.)

made whole and to recoup the substantial attorney's fees he was forced to incur in defending his copyrighted work.

XI.

CONCLUSION

For the foregoing reasons, the Court should hold that the district courts should apply an evenhanded standard in exercising their discretion under Section 505 of the Copyright Act and should award attorney's fees to the prevailing party as a matter of course unless exceptional circumstances are present. The Court should thus reverse the rulings of the courts below and remand with a direction that an award of reasonable attorney's fees be entered in favor of Petitioner.

Respectfully submitted,

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